**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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| HARBI HUSSEIN, on behalf of himself and as a representative of the ESTATE OF SAADO ALI WARSAME, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>DAHABSHIIL TRANSFER SERVICES LTD., *et al.*,<br><br>Defendants. | Civil Action No.: 1:15-cv-09623 (VEC)<br><br>**ORAL ARGUMENT REQUESTED** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS DAHABSHIL, INC., AND DAHAB-SHIL, INC.'S MOTION TO DISMISS**

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This is plaintiffs' second chance to plead a viable claim against Dahabshil, Inc., and Dahab-Shil, Inc. (collectively the "U.S. defendants"). In their initial motion to dismiss, the U.S. defendants pointed out numerous deficiencies in the original complaint. The amended complaint not only ignores those deficiencies but compounds them. With the plaintiffs' having demonstrated that they cannot plead a viable complaint against these defendants, their claims should be dismissed.

## PRELIMINARY STATEMENT

Like the original complaint, the amended complaint describes in some detail the brutal fighting among internal factions that left Somalia a failed state, the rise of al-Shabaab as an Islamist terrorist group, and al-Shabaab's killing of Saado Ali Warsame, a member of Somalia's Federal Parliament and a prominent singer and activist. The amended complaint adds claims by the children of Abdullahi Ali Anshoor, another Somali expatriate who returned to his native country and was brutally murdered.

As to these two deaths, the amended complaint's narrative is punctuated with photographs, names, dates, and specific events. There is little question that the assassination of Saado Ali Warsame at the hands of al-Shabaab and the murder of Abdullahi Ali Anshoor by unknown assailants were tragedies. But the amended complaint breaks down exactly where the original complaint did – in its failure to allege any plausible connection between the defendants, and particularly the U.S. defendants, and these crimes.

Like the original complaint, the amended complaint's only specific allegations against the U.S. defendants come from a 2011 criminal prosecution of two Somali expatriates in Minnesota. The expatriates were convicted of utilizing the U.S. defendants, along with a number of other remittance companies, to send small amounts of money to persons associated with al-Shabaab.

The amended complaint acknowledges that the funds sent through the U.S. defendants were purposefully disguised. They were not sent to known al-Shabaab leaders but to persons purportedly associated with those leaders, and, on two occasions, the expatriates used false names for recipients in order to disguise their association with al-Shabaab. Not only do these allegations not support claims for knowing support of al-Shabaab, they refute such claims.

The U.S. defendants pointed this out in their initial motion to dismiss. That motion also noted that the original complaint tried to paper over its failure to state claims against each individual defendant by resorting to impermissible "group pleading," simply lumping all the defendants together as though they were a single entity. The amended complaint tries to remedy this defect by adding conclusory allegations that defendants acted in a "criminal conspiracy." But this new contention is equally devoid of facts as to conduct by the defendants individually. And in all events, a conspiracy claim cannot be asserted under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a).

The original complaint also failed to allege any facts suggesting that the U.S. defendants knew or intended that funds were being sent to al-Shabaab. The amended complaint tries to patch this deficiency with conclusory allegations of constructive knowledge. Specifically, it invites the Court to infer knowledge and intent based on allegations that the U.S. defendants had lax compliance policies and that they "were fully aware" that transfers were being sent to "areas of Somalia under the complete control of al-Shabaab" and thus were likely to "fall[] into the hands of these terrorists." (First Amended Complaint ("AC") ¶ 59) But an assertion that funds were being transferred to geographic areas under al-Shabaab's control is a far cry from an allegation of knowledge that funds were actually being transferred to al-Shabaab, much less an allegation that they were transferred with an intent to assist al-Shabaab. The amended complaint also makes no attempt to cure the utter failure to allege that any conduct by the U.S. defendants proximately caused the attacks on Mrs. Warsame (and now Mr. Anshoor).

The ongoing brutal upheaval in Somalia and the deaths of Saado Ali Warsame and Abdullahi Ali Anshoor in that afflicted country, however they were caused, are an international disgrace. But, on its face, the amended complaint here does not support a claim against the U.S. defendants for these deaths, and it therefore must be dismissed as to them.

## ANALYSIS OF FACTS AS ALLEGED

Under *Twombly* and *Iqbal*, a complaint can be sustained over a motion to dismiss only if, accepting its "well-pleaded factual allegations" as true, it states a claim that is "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). But this presumption of truth applies only to "well-pleaded *factual* allegations," not to legal conclusions. *Id.* at 678. Courts do not have an "obligation to entertain pure speculation and conjecture." *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (dismissing ATA claim). Accordingly, it is critical to analyze allegations with care, to separate so-called background facts from those facts directly pertinent to the claims for relief, to distinguish between actual allegations of facts and mere conclusions unsupported by facts, and to identify the conduct of each individual corporate defendant whom plaintiff would hold liable.

**A. Allegations Concerning The Structure and Operation of "Dahabshiil**." The amended complaint once again groups the defendants together under the common term "Dahabshiil." It describes defendants as members of an "informal hawala network" (AC ¶ 57), but it gives that term little content. It asserts that the U.S. defendants are "controlled by and acted as agent of" the U.K. defendant (AC ¶¶ 16-17), but this conclusory statement is unsupported by factual allegations of the source of the agency (actual or apparent) or any right of control (contractual or otherwise.)

The amended complaint now seeks to justify lumping the defendants together without specifying their individual conduct by adding yet another group label, a conclusory allegation that defendants formed a "criminal conspiracy" to funnel money to al-Shabaab to fund its terrorist activities. As discussed below, there is no legal basis for a conspiracy claim under the ATA. But even if such a claim were legally proper, the amended complaint asserts it here as nothing more than another legal conclusion unsupported by allegations of actual facts. The amended complaint simply recites the legal elements of a conspiracy, alleging the existence of an "agreement" (AC ¶ 40), but offering no content as to when such an agreement was entered into, who was party to it, or how it was to be carried out.

The amended complaint alleges that group-named "Dahabshiil" has "branches" operating in 126 countries, is the largest money transfer business in Africa, and is responsible for the majority of the $1.6 billion that is transferred into Somalia each year. (AC ¶ 33.) Yet it says nothing about the basic purpose or salutary effect of this funds transfer business, content to try to leave a sinister impression as to the very nature of such business. Because Somalia is a failed state with no banking industry, remittances are a lifeline, not just for individuals, but for the many relief agencies that operate in that country. A recent U.S. Agency for International Development report, for example, describes this service in Somalia:

> Remittances are not counted in the gross domestic product (GDP) but are a dominant feature of Somalia's economy and a key factor in the welfare of its people. About 1 million Somalis live abroad as part of the "diaspora". Most left to escape war, rather than famine, and were relatively well educated and well off. This, combined with a strong Somali entrepreneurial streak, positioned many to thrive overseas. Strong family and clan ties mean that much of their income – at least $1.2 billion per year, equal to almost half of Somalia's GDP – flows back to

> Somalia as remittances and keeps many families above water despite high unemployment.

Somalia Economic Growth Strategic Assessment: Final Assessment Report (July 2014) at 4.[1]

**B. Allegations Concerning Mrs. Warsame's Death.** According to the amended complaint, Mrs. Warsame immigrated to the United States as a refugee from Somalia's civil war in the early 1990s. She moved back to Somalia in 2012 to run for political office and became a member of the Somali Federal Parliament. (AC ¶ 3.) She was murdered by two al-Shabaab operatives in July 2014, and al-Shabaab publicly acknowledged its responsibility for her assassination. (AC ¶¶ 7-8.) The two operatives were convicted of that crime and executed in May 2015. (AC ¶ 8.) The amended complaint also alleges that in 2011 Mrs. Warsame recorded a song critical of "Dahabshiil's" business and that, as a result, "Dahabshiil" "put a multi-million dollar bounty on [her] life." (AC ¶¶ 5-6.) Yet, like the original complaint, the amended complaint fails to give any factual substance to this scandalous allegation or to connect it to any actionable claim. It does not allege what entity purportedly announced the "bounty." It does *not* allege that al-Shabaab knew about the "bounty," acted because of the "bounty," or that this purported "bounty" in any way caused or contributed to Mrs. Warsame's death. The timeline described in the amended complaint, moreover, refutes any plausible connection between Mrs. Warsame's death in 2014 and the four small transfers made through the U.S. defendants in 2009, when she still lived in the United States.

**C. Allegations Concerning Mr. Anshoor's Death.** The amended complaint adds new claims by the children of Abdullahi Ali Anshoor who also was murdered in Somalia in 2014. Like Mrs. Warsame, Mr. Anshoor fled the civil war in Somalia and moved to the United States. In 2013, he returned to Somalia to work for the local government in Mogadishu and an international aid organization rebuilding roads and sewer systems. According to the amended complaint, his work to improve the lives of the Somali people made him a target of al-Shabaab. (AC ¶ 79.) In late 2014, he was stopped while driving his car and shot to death by three unknown assailants. (AC ¶ 81.) Unlike in Mrs. Warsame's case, the amended complaint does not allege that al-Shabaab ever announced publicly that it was responsible for Mr. Anshoor's death. Nor does the amended complaint allege that Mr. Anshoor's assailants were ever identified, arrested, and convicted. The amended complaint tries to tie his assailants to al-Shabaab because his murder was "committed in the signature style of al-Shabaab" – a style that is not identified – and because a subsequent police investigation allegedly determined, despite the lack of arrests, that "al-Shabaab was responsible." (AC ¶ 83.) The amended complaint contains no allegations of fact connecting the U.S. defendants to Mr. Anshoor's death.

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[1] *Available at* http://pdf.usaid.gov/pdf_docs/PA00JXG7.pdf.

**D. Allegations Concerning Defendants' Purported Ties with Al-Shabaab**. When the amended complaint turns to what purports to be the substance of this action – plaintiffs' charge that "Dahabshiil" is a "longtime financial supporter" of al-Shabaab and financed the Warsame and Anshoor assassinations – it is full of "sound and fury," but devoid of factual substance.

**1. The Barre Transfer.** The first asserted instance of purported "Dahabshiil" support for al-Shabaab in fact alleges no involvement by any of the four defendants in this case. (AC ¶¶ 45-48.) The amended complaint alleges that in 1998 Mohammed Soliman Barre, later a Guantanamo detainee, received $10,000 from a Dahabshiil entity in Dubai to establish a branch office in Karachi, Pakistan. Barre is then alleged to have provided "direct financial support," not to al-Shabaab, but to "al-Qaida," "al-Wafa," and other unnamed "terrorist support entities." The only money transfer identified in connection with this allegation was allegedly "used to fund a November 2002 al-Qaeda attack on Israeli interests in Mombasa, Kenya." (AC ¶ 47.) The amended complaint fails to tie Barre's alleged conduct to any of the defendants and fails to connect it in any way to the deaths of Mrs. Warsame or Mr. Anshoor, which occurred some *twelve years* after Barre's capture and detention. There is no allegation that any defendant even knew about these alleged acts.

**2. The Amniyat Transfer.** The second asserted instance (AC ¶¶ 50-52) relies on a United Nations Report,[2] which describes a large-scale assassination operation conducted by Amniyat, an intelligence unit of al-Shabaab. But the amended complaint's inference of culpability by these defendants finds no support in the UN Report. The Report states that the funds at issue were raised in Qatar by an unknown group or entity and transferred via an unnamed Dahabshiil entity to a Somali in Mogadishu who turned out to be an Amniyat officer. (UN Report at 58.) Contrary to the allegation in the amended complaint, the Report does not identify the Dahabshiil entity that made the transfer, much less that any of the four defendants here had knowledge that the funds were meant for Amniyat, that any terrorist activity was planned, or that they were otherwise complicit in the matter. (*Id.*). The amended complaint then strays even further from the Report, asserting that three other fund transfers to Amniyat were remitted through Dahabshiil PVT. (AC ¶ 52.) In reality, the Report simply states that these transfers were made through "remittance companies." (UN Report at 58-59.)

**3. The Minnesota Criminal Action.** The third purported instance – and the only one involving the U.S. defendants – is drawn from the record of a Minnesota criminal action against two Somali expatriates resident in the United States. (AC ¶ 53.) The amended

[2] AC ¶ 4 n.1, citing *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia*, U.N. Doc. S/2013/413 (July 12, 2013), *available at* http://repository.un.org/bitstream/handle/11176/24077/S_2013_413-EN.pdf. Although this extensive report is paginated, the complaint fails to provide any pinpoint cites for its allegations.

complaint alleges that in 2009 four transfers – $200, $250, $300, and another $200 – were made through branches of the U.S. defendants to persons in Somalia or the Sudan who the prosecutors charged were associates of certain al-Shabaab leaders or to an al-Shabaab member himself whose identity was disguised by using false names. (*Id.*). The amended complaint acknowledges that the Somali expatriates charged in the Minnesota criminal proceeding deliberately disguised the recipients of these transfers. (*Id.*). The U.S. defendants were not charged in the Minnesota criminal action. Indeed, Dahab-Shil, Inc.'s President, Mohamad Nor, testified as a prosecution witness in that case with no suggestion that he or his company was complicit in any terrorist funding.[3]

**4. Extortion Payments to Al-Shabaab.** The amended complaint alleges that the Somali defendant, Dahabshiil PVT, made regular payments to al-Shabaab to keep its branches open in that country and that al-Shabaab shut down rival money transfer companies to maintain control of cash flows through Dahabshiil PVT. (AC ¶ 55.) As alleged, this is pure extortion, rather than some type of voluntary support. But in any event, there is no suggestion that this allegation concerns the U.S. defendants in any way.

**5. South African Employee.** Finally, the amended complaint adds an allegation that an employee of "Dahabshiil"'s South African establishment was arrested for

[3] Transcript of Trial, Vol. V, at pages 729-67, *United States v. Ali*, No. 10-cr-187 (MJD/FLN) (D. Minn. Nov. 25, 2013), ECF No. 286, attached hereto as Exhibit 1 to the Declaration of Elizabeth L. Marvin. (The trial transcript for this case, consisting of twelve volumes spanning docket entries 280-293, is hereinafter referred to as "Minnesota Tr.") The amended complaint relies exclusively on the record of the Ali and Hassan criminal trial. (AC ¶¶ 53-54.) This Court may consider the documents upon which a complaint is based when deciding a motion to dismiss, even if they are not attached to the complaint. *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995). And, of course, court documents, including trial transcripts, "constitute[] a public record of which the Court can take judicial notice." *Johnson & Johnson v. Am. Nat'l Red Cross*, 528 F. Supp. 2d 462, 464 n. 1 (S.D.N.Y. 2008); *see also*, *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008); *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000).

recruiting "young Kenyan men" to join al-Shabaab. (AC ¶ 56.) Again, there is no allegation that this conduct was known to the U.S. defendants (or any other defendant) or that it was in any way related to the injuries plaintiffs claim here.

**E. Allegations That Undermine the Amended Complaint's Own Thesis.** Although the amended complaint rests on the assertion that the defendants knowingly provided financial support to al-Shabaab, the amended complaint actually includes allegations diametrically to the contrary.

**1. Defendants' Money Laundering Controls**. The amended complaint makes a series of conclusory allegations concerning the purported absence of effective anti-money laundering (AML) and anti-terrorism controls by the defendants. But these allegations only serve to undermine plaintiffs' claims. The ATA requires that a defendant knowingly and/or intentionally provide support to a terrorist entity. To the extent that the amended complaint asserts that defendants had poor controls, such allegations, at most, speak only to negligence. They are the very opposite of the intent or knowledge that the ATA requires.

In their amended complaint, plaintiffs try to deflect that conclusion by adding what amounts to a generic allegation of willful blindness: that the U.S. defendants refuse to implement more stringent controls because their lax standards help them to aid al-Shabaab. (AC ¶ 59.) But the amended complaint's sole example of such a lack of control is the allegation that the U.S. defendants' policies do not require proof of identity from senders of transfers under $2000.[4] Even if this were an example of "lax" controls, which it is not, the amended complaint does not

[4] The amended complaint's allegation that the defendants transfer up to $2,000 from their U.S. branches without verifying the *transferring* party's identification (AC ¶ 58) describes a practice that is more conservative than required by U.S. law, which requires such verification only for transfers in excess of ***$3,000***. 31 C.F.R. § 1010.415.

allege that any transfer to al-Shabaab occurred because of a *sender's* having disguised his or her identity.[5]

**2. Al-Shabaab's Attacks on the Somali Defendant.** The amended complaint also makes clear that Dahabshiil PVT was another of al-Shabaab's victims. The amended complaint belies any inference of friendly relations between al-Shabaab and Dahabshiil PVT when it affirmatively alleges that al-Shabaab extorted payments from Dahabshiil PVT and that al-Shabaab shut down several of its branches when Dahabshiil PVT failed to make payments. (AC ¶ 55.) In addition, the UN Report on which plaintiffs extensively rely describes a bomb attack on Dahabshiil's main office in Mogadishu in April 2013, several days after al-Shabaab forcibly closed some Dahabshiil PVT branches in an attempt to coerce it to stop working for international aid agencies that al-Shabaab had banned. (UN Report at 402.) These allegations are inconsistent with the defendants' being involved in a voluntary conspiracy to fund al-Shabaab.

**3. The Alleged Bounty.** The amended complaint asserts that, in an apparent fit of pique after Mrs. Warsame recorded her song "Bloodsmelter," "Dahabshiil" put a multi-million dollar bounty on Mrs. Warsame's life. (AC ¶¶ 6, 73.) In making this allegation, the amended complaint again reverts to group pleading, providing no indication which defendant supposedly offered this alleged bounty, how it was offered, or to whom. And while at first blush the amended complaint appears to suggest a link between this alleged bounty and Mrs.

[5] The amended complaint reaches even further afield in reciting an investigation in Denmark – the U.S. defendants do not operate in Denmark, and the amended complaint does not suggest otherwise – that led to a report to the Danish police that the Danish entity had "completely inadequate" AML/anti-terrorism controls. (AC ¶ 65.) How this report concerning Danish operations has any conceivable bearing on the liability of the U.S. defendants or on alleged transfers of funds from the United States to al-Shabaab in support of terrorism is wholly unexplained.

Warsame's assassination, it is careful not to actually allege one. The amended complaint does not allege that any such bounty was ever paid, that al-Shabaab or anyone else ever tried to collect it, that the U.S. defendants transferred any funds from the United States to Somalia that were in any way connected to the Warsame assassination, or that the al-Shabaab assassins were acting at the direction of any defendant in this action or responding in any way to the asserted bounty in killing Mrs. Warsame as opposed to acting on their own grievances against her for her longstanding opposition to their terrorist organization.

As set forth in detail below, plaintiffs' conclusory and conflicting allegations unsupported by actual facts, coupled with necessary allegations wholly missing in their amended complaint, doom this action from the outset and require dismissal for failure to state an actionable claim.

## ARGUMENT

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the Supreme Court ruled that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "Bare assertions" that are nothing more than a "formulaic recitation of the elements" of a claim are "conclusory and not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). With respect to the U.S. defendants, the amended complaint is the epitome of the sort of conclusory pleading, devoid of genuine fact allegations, that the Supreme Court condemned in *Twombly/Iqbal*. Every aspect of the amended complaint suffers from this fundamental defect.

### I. The Amended Complaint Fails to Allege Facts Both as to the Plaintiffs' Own Standing and as to the Defendants' Individual Conduct.

The amended complaint does not begin to satisfy *Twombly/Iqbal* in identifying the alleged roles of the parties, both plaintiff and defendant. Plaintiffs assert that they bring this action on behalf of themselves and as "representative[s]" of the estates of their deceased parents (AC ¶¶ 11-12), but the amended complaint fails to plead any facts in support of such representative capacity. Plaintiffs assert that they suffered injury at the hands of an aggregated entity they call "Dahabshiil," lumping all defendants together as part of what they assert is a "Criminal Conspiracy" (AC ¶ 40), but the amended complaint makes no effort to identify that alleged conspiracy or to distinguish among the individual defendants' purported conduct.

### A. Claims on Behalf of the Warsame and Anshoor Estates Must Be Dismissed Pursuant to Rule 12(b)(1) Because the Amended Complaint Fails to Allege Facts in Support of Plaintiffs' Assertion of Standing as "Representatives."

Like the original complaint, the amended complaint is devoid of factual allegations concerning a matter as to which plaintiffs surely must know the facts: the basis for their purported standing as "representatives" of their respective deceased parents' estates. The U.S. defendants have searched the electronic records for any probate estate of either Saado Ali Warsame or Abdullahi Ali Anshoor in the state of Minnesota. According to those records, no such estates have been opened. (Declaration of Lauren R. Skala, dated March 14, 2016, ¶ 7.)

Under Rule 9(a), Fed. R. Civ. P., a plaintiff need not allege facts supporting his representative capacity except when necessary to establish the court's subject matter jurisdiction. *See Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 85-86 (D.R.I. 2001). When, as here, a plaintiff's standing is challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1), it is the plaintiff's burden to allege facts as to his standing so the Court can evaluate its Article III jurisdiction over the claim. Where a plaintiff purports to bring an action on behalf of an estate, at a minimum, he must allege facts showing his authority to so act. *See, e.g.*, *MacEachern v. City of Manhattan Beach*, 623 F. Supp. 2d 1092, 1101 (C.D. Cal. 2009) (applying California law); *United States v. 12636 Sunset Ave., Unit E-2*, 991 F. Supp. 2d 709, 711-13 (D. Md. 2014) (Maryland law). New York law (and plaintiffs have not suggested that some other law applies) provides that "only a duly appointed personal representative may maintain an action on behalf of an estate." *David v. Rabuffetti*, No. 08 Civ. 5647, 2011 WL

1346997, at *7 (S.D.N.Y. Mar. 30, 2011); *Jordan v. Jordan*, 120 A.D.3d 632, 632 (2d Dep't 2014).

The amended complaint alleges no facts supporting that plaintiff Harbi Hussein or plaintiff Ayanle Ali has been duly appointed in the United States (or in any foreign jurisdiction) to act on behalf of his respective parent's estate. In the absence of such allegations, they lack standing to bring claims on the estates' behalf, and their claims in that capacity should be dismissed.

### B. The Amended Complaint's "Group Pleading" and Agency Allegations Do Not Support Plaintiffs' Claims Against the U.S. Defendants.

Throughout his original complaint, plaintiff Hussein was content to make conclusory allegations against a non-existent, non-party entity that he called "Dahabshiil," even though the complaint did not actually purport to sue such an entity. When it came to identifying what conduct each defendant engaged in, the original complaint was largely silent, just lumping the defendants together under this concocted group name. This was improper. When a complaint "names multiple defendants, [it] must provide a plausible factual basis to distinguish the conduct of each of the defendants." *Ochre LLC v. Rockwell Architecture Planning and Design, P.C.*, No. 12 Civ. 2837 (KBF), 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012); *see also, In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007); *Am. Sales Co., Inc. v. AstraZeneca AB*, No. 10 Civ. 6062 (PKC), 2011 WL 1465786, at *5 (S.D.N.Y. April 14, 2011); *Harris v. NYU Langone Med. Ctr.*, No. 12 Civ. 0454 (RA)(JLC), 2013 WL 3487032, at *7 (S.D.N.Y. July 9, 2013). The amended complaint perpetuates this deficiency. Plaintiffs continue to define a group of all defendants as "Dahabshiil," (AC Introduction), and throughout the amended complaint they revert to the assertion that "Dahabshiil" did this or "Dahabshiil" knew that. (*E.g.*, AC ¶¶ 6, 40, 50, 51, 56, 57, 67, 73.)

In the amended complaint, as in the original complaint, plaintiffs couple their "group pleading" with an equally defective pleading of agency. They allege that the U.S. defendants and the Somali defendant are each "controlled by and acted as the agent[s] of" the U.K. defendant, Dahabshiil Transfer Services Ltd. (AC ¶¶ 16-18), that the U.K. defendant controls their global operations and policies, provides them with training materials, and controls a shared IT system (AC ¶ 39), and that various actions alleged were "dictated by" or under "the direction" of the U.K. defendant (*e.g.*, AC ¶¶ 58-62). But repeatedly alleging that an agency relationship exists is not the same thing as actually pleading facts that support that legal conclusion. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Melito v. American Eagle Outfitters, Inc.*, No. 14-cv-02440 (VEC), 2015 WL 7736547, *6 (S.D.N.Y. Nov. 30, 2015) (Caproni, J.) (citations omitted). If plaintiffs wish to rely on the existence of an agency relationship, then facts establishing an agreement to create such a relationship (or the manifestation of apparent agency) must be pleaded in the amended complaint, and here, they simply are not. "Mere conclusory allegations" that fail to plead facts in support of the purported agreement upon which such a relationship must rest fail to meet basic pleading requirements. *See Melito*, 2015 WL 7736547 at *7.

Even if plaintiffs' conclusory allegations of agency were taken as true, they would not state a claim against the U.S. defendants. As purported agents, the U.S. defendants can be liable only for their own conduct and not for the acts of their purported principal – Dahabshiil Transfer Services, Ltd. There is no doctrine of "*respondeat inferior*." *See* Restatement (Third) of Agency § 7.01 cmt. d (2006) (collecting cases); *United Magazines Co. v. Murdoch Magazines Distrib.*, *Inc.*, 353 F. Supp. 2d 433, 441 (S.D.N.Y. 2004) ("Under princip[les] of tort law, an agent is not liable for its principal's tortious conduct…"); *Loeb v. U.S. Dept. of Interior,* 793 F. Supp. 431, 437-39 (E.D.N.Y. 1992). The sole allegation of involvement by either of the two U.S. defendants in any transfers that allegedly ended up in al-Shabaab's coffers were the four small transfers in 2009 that were described in the Minnesota criminal prosecution. (AC ¶ 53.) These small transfers, which occurred years before Mrs. Warsame returned to Somalia, ran for office, or recorded her song and years before Mr. Anshoor returned to work on roads and sewer projects, are in no way sufficient to make them liable for the claims asserted, and the amended complaint makes no effort to tie them to the killings. It does not matter if the other defendants could be found liable. Their alleged knowledge, intent, and conduct cannot be imputed to the U.S. defendants under theories of agency.[6]

### C. The Amended Complaint's "Criminal Conspiracy" Allegations Are Equally Deficient and in Any Event Do Not Support a Claim Under the ATA.

In an apparent attempt to bolster their deficient group-pleading and agency allegations, plaintiffs now add allegations that the four defendants can nonetheless still be lumped together because they were members of a purported "criminal conspiracy" to transfer money to al-Shabaab. (AC ¶¶ 40-43.) What plaintiffs label as a "criminal" conspiracy is presumably an attempt to assert a "civil" conspiracy claim, since 18 U.S.C. § 2333(a) is a civil statute.[7] But

[6] The amended complaint's reliance on group pleading infects its allegations against all of the defendants. Indeed, some of the conduct that the amended complaint attributes to the aggregate "Dahabshiil" on its face does not relate to *any* of the four defendants. For example, the amended complaint's leading instance of purported financial support of al-Shabaab – the alleged transfer of funds by Mohammed Soliman Barre from a branch office he operated in Karachi, Pakistan, to finance a November 2002 al-Qaida attack on Israeli interests in Mombasa, Kenya (AC ¶¶ 45-48) – has zero pleaded connection to any of these defendants or, for that matter, to Somalia or al-Shabaab.

[7] *See Rothstein v. UBS AG*, 708 F.3d 82, 88 (2d Cir. 2013) (noting that 18 U.S.C. § 2333(a) is the "civil liability provision of the ATA").

§ 2333(a) does not provide for claims of civil conspiracy, and, even if it did, the allegations regarding civil conspiracy are themselves wholly conclusory and fail to meet the *Twombly/Iqbal* pleading standard.

**1. Section 2333(a) Does Not Provide For Claims of Civil Conspiracy.**

In *Linde v. Arab Bank, PLC*, 944 F. Supp. 2d 215 (E.D.N.Y. 2013), Judge Gershon rejected the contention that § 2333(a) permits claims for civil conspiracy. *Linde* so ruled based on the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and the Second Circuit's decision in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013). In *Central Bank*, the Supreme Court refused to recognize aiding and abetting claims under § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 on ground that the Court could not infer such liability when the statute was silent on the subject. In *Rothstein*, the Second Circuit applied *Central Bank* in similarly rejecting aiding and abetting claims under § 2333(a) of the ATA, where that statute, too, is "silent as to the permissibility" of such liability. *Rothstein*, 708 F.3d at 97.[8] In applying *Rothstein* to consider the exact issue presented here, whether civil conspiracy is permitted under § 2333(a), *Linde* concluded that "[i]t is likely that the Second Circuit would treat claims for civil conspiracy as akin to civil aiding and abetting claims under § 2333(a)." *Linde*, 944 F. Supp. 2d at 216. Judge Gershon's prediction of the Second Circuit's disposition is soundly based on *Rothstein*, *Dinsmore*, and *Central Bank*. Plaintiffs' reliance on conspiracy allegations should therefore be rejected here.

[8] As noted by the Second Circuit in *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998), "every court to have addressed the viability of a conspiracy cause of action under § 10(b) and Rule 10b-5 in the wake of *Central Bank* has agreed that *Central Bank* precludes such a cause of action."

**2. The "Criminal Conspiracy" Label Does Not Correct Plaintiffs' Group Pleading Defect.**

Plaintiffs' new allegation of a "criminal conspiracy" does not eliminate or satisfy the requirement under Fed. R. Civ. P. 8 that the complaint must set forth the specific conduct that each defendant is alleged to have done in furtherance of the conspiracy. *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 512-13 (S.D.N.Y. 2009); *In re Elevator Antitrust Litig.*, No. 04 CV 1178 (TPG), 2006 WL 1470994, *1-2 (S.D.N.Y. May 30, 2006). Although a validly pleaded conspiracy (followed by actual proof of the existence of the conspiracy) would entitle the Court to hold conspirators liable for each other's conduct, the basic question of "who did what?" must be pleaded and ultimately proved. *Brownstone Inv. Group, LLC v. Levey*, 468 F. Supp. 2d 654, 660-61 (S.D.N.Y. 2007); *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981). Here, plaintiffs persist in their failure to specify the conduct that each defendant is accused of, and simply invoking the label of conspiracy does not remedy this deficiency.

**3. The Amended Complaint Fails to State a Claim for Civil Conspiracy.**

Even if a civil conspiracy claim could properly be inferred under § 2333(a), plaintiffs have failed to adequately plead it in accordance with *Twombly/Iqbal*. "It is well settled that claims of conspiracy 'containing only conclusory, vague, or general allegations of conspiracy … cannot withstand a motion to dismiss.'" *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (quoting *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993)) (affirming dismissal of ATA claim). Conspiracy claims that are not backed by facts that would provide "plausible grounds to infer an agreement" warrant dismissal. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007). In *Twombly*, which also examined the adequacy of conspiracy claims, the Supreme Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions" and cautioned that "a formulaic recitation of the elements . . . will not do." 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Here, a comparison of the amended complaint to the original version confirms that plaintiffs' conspiracy allegations were concocted in reverse, starting with a facially defective group-name pleading and later adding an empty "criminal conspiracy" label when that group pleading defect was exposed in defendants' prior motions to dismiss. The amended complaint states only that the "'Dahabshiil Criminal Conspiracy'. . . is an agreement between each of the Dahabshiil Criminal Conspirators" to provide funds to al-Shabaab. (AC ¶ 40.) Yet it is well-settled that "conclusory allegation[s] of agreement at some unidentified point do[] not supply facts adequate to show illegality." *In re Elevator Antitrust Litig.*, 502 F.3d at 50-51 (citing *Twombly*, 550 U.S. at 557). Here, plaintiffs make generic allegations that defendants' goals were to provide financing to al-Shabaab while making profits for themselves and destroying their rivals and critics (AC ¶¶ 41-42), but these allegations lack any content as to how and when the agreement was reached, with whom, and the formation, structure, or operation of the purported conspiracy.

The allegations regarding the motives for this conspiracy are, moreover, contradicted by the allegations in the amended complaint and the UN report on which plaintiffs rely. The fact that al-Shabaab closed down several Dahabshiil PVT branches for refusing to make extortion payments (AC ¶ 55) and for supporting international aid organizations (UN Report referenced in AC ¶ 51, at 402) renders implausible any suggestion of a motive to build a supportive relationship between defendants and al-Shabaab. The allegation that the U.S defendants knew and agreed to the purported conspiracy's alleged aims (AC ¶¶ 41-42) is also belied by the allegations that the only transfers they are alleged to have made were to beneficiaries whose identities were *unknown* to these defendants because they were disguised by using cutouts and false names. (AC ¶ 53.)

In short, the amended complaint contains no genuine factual support for an inference that the U.S. defendants entered into an actual agreement to engage in a civil conspiracy. Thus, the conclusory allegations of conspiracy should be recognized for what they are – simply another manifestation of group pleading that fails to meet the pleading requirements of Rule 8.

## II. The Amended Complaint Fails to State a Valid § 2333 ATA Claim Against the U.S. Defendants.

The amended complaint is also barren of any well-pleaded allegations of fact supporting critical elements of a proper § 2333 ATA claim. In particular, it pleads the critical elements of knowledge/intent and proximate causation as pure legal conclusions, unmoored from any allegations of actual facts.

### A. The ATA's Statutory Scheme.

Section 2333(a), on which plaintiffs ground their claims, allows for civil recovery of money damages for injury "by reason of an act of international terrorism." The predicate crimes for § 2333(a) claims are contained in 18 U.S.C. §§ 2339A-C. In pertinent part:

- Section 2339A makes it a crime to provide "material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation" of a designated offense, here the killing a U.S. national abroad.[9]

- Section 2339B makes it a crime to "knowingly provide[] material support or resources to a foreign terrorist organization."

- Section 2339C makes it a crime to provide or collect funds "by any means, directly or indirectly, unlawfully and willfully . . . with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out . . . [an] act intended to cause death or serious bodily injury to a civilian . . . when

[9] Section 2339A references a number of statutory criminal provisions, but the only one conceivably pertinent here is 18 U.S.C. § 2332(a), which criminalizes killing a U.S. national outside the United States.

> the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[10]

To prevail in a § 2333(a) action that rests on violations of §§ 2339A-C, plaintiff must prove "three formal elements: unlawful *action*, the requisite *mental state*, and *causation*." *Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509, 514 (S.D.N.Y. 2014) (citing *Gill v. Arab Bank, PLC,* 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012)). As to the first element, plaintiffs here allege that "Dahabshiil" was used to remit funds to al-Shabaab.[11] As to the second element, the requirement of knowledge or intent, plaintiff must allege that the defendant possessed criminal *mens rea*. *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 (2d Cir. 2014). Since, as discussed above, § 2333(a) does not provide for civil conspiracy or aiding and abetting claims, each defendant must meet the *mens rea* requirement individually. *See Rothstein*, 708 F.3d at 98. As to the third element, the § 2333(a) plaintiff must also allege that the defendant's actions were a proximate cause of the injury of which plaintiff complains. *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 508 (E.D.N.Y. 2012). Here, the amended complaint contains conclusory allegations of knowledge and intent (or willful blindness) and proximate cause, but these are bare legal conclusions, and the few facts alleged actually support the converse. This is most prominently the case in respect to the claims against the U.S. defendants.

### B. The Amended Complaint Fails to Plead Knowledge, Intent, or Willful Blindness.

Plaintiffs' amended complaint contains only one paragraph dealing directly with actual conduct by the U.S. defendants. (AC ¶ 53.) Their claims that the U.S. defendants knowingly, intentionally, or with willful blindness provided material support to al-Shabaab must therefore arise out of the transactions listed in that paragraph. These are limited to the following allegations of fact (AC ¶ 53):

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[10] Section 2339C also references violations of U.S. treaty obligations, none of which are pertinent here.

[11] Although the amended complaint also alleges that Dahabshiil PVT paid al-Shabaab "out of its own funds," (AC ¶ 55), as discussed above, with respect to any such payments, Dahabshiil PVT was a victim of al-Shabaab's extortion and not its financial supporter.

- On February 15, 2009, Amina Saeed Hassan Abdilleh sent $200 from her account at the Falls Church, Virginia branch of Dahabshil, Inc., to a Madina Haji Ahmed, who was allegedly an associate of al-Shabaab's regional governor in Baidoa, Hassan Afgoye. The amended complaint does *not* allege that Dahabshil, Inc., knew that Ahmad was an associate of Afgoye or that the funds were intended for al-Shabaab.

- On April 3, 2009, Hawo Mohamed Hassan sent $200 from her account at the Rochester, Minnesota branch of Dahab-Shil, Inc., to an account in Khartoum belonging to an Abdirisaq Hassan Osman. Osman was allegedly a close associate of an al-Shabaab spiritual leader. It is again not alleged that Dahab-Shil, Inc., knew that the beneficiary was a known associate of the al-Shabaab spiritual leader or that the funds were intended for al-Shabaab.

- On May 31 and July 5, 2009, Abdilleh sent $250 and $300 respectively through her account with Dahabshil, Inc., to Afgoya using the fake names "Fadumo Farah Nur" and "Nadifo Muse Ali." Once again, it is not alleged that Dahabshil, Inc., knew that the funds were intended for Afgoye or that the funds were intended for al-Shabaab.

Although the amended complaint tries to use these $950 in transfers to suggest that the U.S. defendants had some special relationship with al-Shabaab, in reality, the U.S. defendants were far from the only remittance companies used by the Minnesota criminal defendants. In fact, the evidence presented at the Minnesota trial, on which plaintiffs expressly rely, reflects that the criminal defendants in that case were convicted of sending $13,468 to al-Shabaab[12] by dividing the funds into multiple smaller payments and making the transfers through several different remittance companies, including Kaah Express, LLC, Dar al Tawakul General Trading, LLC, Qaran Financial Express, Mustaqbal Express, Hodan Global.[13] These other transfers

[12] Minnesota Tr. Vol. X, at 1571-74, ECF No. 291.

[13] *See* Marvin Decl. Exhibit 1, Testimony of FBI Special Agent Michael Wilson, Minnesota Tr., at, *inter alia*, Vol. IV, at 688:18-689:3 (Kaah Express, LLC), 702:12-25 (Dar al Tawakul General Trading, LLC), ECF No. 285; Vol. VI, at 860:25-862:5 (Qaran Financial Express), 886:11-15 (Hodan Global), ECF No. 287; Vol. VII, at 1014:6-14 (Mustaqbal Express), ECF No. 288.

utilized the same disguising techniques that the criminal defendants used with the U.S. defendants. For example, a transfer sent via Qaran Express also used the fake beneficiary name "Fadumo Farah Nur." *Id*. at 999:23-1000:4. As the evidence at trial revealed, the entire criminal scheme was calculated to conceal from U.S. authorities *and the remittance companies themselves* that the money was going to al-Shabaab. Plaintiffs do not allege facts distinguishing the U.S. defendants' knowledge from that of these other companies nor explain how the U.S. defendants are liable for the deaths of Mrs. Warsame and Mr. Anshoor when these other companies are not.[14]

The amended complaint does not contain any factual allegations in support of plaintiffs' claims that at the time of the relevant transfers, the U.S. defendants knew the funds were going to al-Shabaab in violation of § 2339B, that the transfers would be used to injure any American citizen in violation of § 2339A, that they would be used in any terrorist attack in violation of § 2339C, or that the U.S. defendants intended any of the foregoing. There is simply no fact-based allegation of the U.S. defendants' criminal knowledge, intent, or willful blindness.

**1. Plaintiffs' allegations of "knowledge" and "intent" are insufficient.**

Plaintiffs allege knowledge or intent only as generic legal conclusions, once in a caption to a section of the amended complaint (stating that the generic "Dahabshiil Knowingly Transfers Funds to al-Shabaab") and in each of the three "Counts." These are the sort of "bare assertions" that were expressly rejected in *Iqbal*. There is no allegation that the U.S. defendants knew or intended that their customers' $200 to $300 transfers would reach persons who were associated in some unidentified way with other persons who were part of al-Shabaab. Indeed, the amended

[14] Plaintiffs assert no independent basis for their allegations about these transfers, acknowledging that their allegations are based on what was "exposed during the 2011 criminal trial." (AC ¶ 53). Yet what they recount from that trial record is selective and misleading. What actually occurred at that trial is subject to judicial notice by the Court, as set forth in footnote 6, *supra*.

complaint affirmatively alleges that the customers actively disguised the true identity of the beneficiaries by using two different fake names and by sending transfers not to known al-Shabaab representatives but to alleged "associates" of such representatives who were not on the U.S. "Specially Designated Nationals" list. (AC ¶ 53.) If there were plausible grounds for criminal liability, one might expect to have seen the U.S. defendants indicted along with their customers for these four transfers. But as plaintiffs well know, there was no suggestion in the Minnesota trial that the U.S. defendants (or any of the other remittance companies used by the criminal defendants) had any culpability, much less any reason to believe that the remittance of these funds would put U.S. citizens' lives at risk.

Nor can any inference of guilty knowledge or intent be gleaned from the amended complaint's scandalous charge, utterly devoid of facts, that the generic "Dahabshiil" placed a multi-million dollar bounty on Mrs. Warsame's life because of the release of her 2011 song criticizing some Dahabshiil entity. Mrs. Warsame's 2011 song could not possibly have motivated the U.S. defendants to remit the four transfers alleged. Those 2009 transfers predate by *two years* the song's release and even predate by *three years* Mrs. Warsame's return to Somalia. It is simply impossible for the U.S. defendants to have formulated an intent to harm Mrs. Warsame based on something that had not yet occurred.

At most, the amended complaint alleges only that the U.S. defendants acted as a conduit for funds being transferred by other actors. In the analogous situation, in which banks have been sued because customers used their services to transfer funds to terrorist organizations, the courts have held that there is no liability for "the injuries sustained by an act of terrorism simply because the monies that funded the violent act passed through the bank itself, or one of its correspondent banking accounts, during the performance of routine banking services" without the bank's knowledge or intent to provide funds to terrorists. *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 518 (S.D.N.Y. 2010), *aff'd*, 714 F.3d 118 (2d Cir. 2013). To do so would hold the financial institution liable for the wrongful acts of its customer "based solely on the allegations that the patron utilized the banking and financial services offered to all bank customers." *Id*. That is no less true here.

**2. Plaintiffs' conclusory allegations of "willful blindness" do not rescue their defective knowledge allegations.**

Plaintiffs' breezy invocation of "willful blindness" (AC ¶¶ 86, 93, 99) fares no better. Knowledge and/or intent as required by § 2333(a) is not satisfied by a possibility of awareness; New York federal courts have refused to create a *de facto* strict liability regime for material-support crimes. In respect of an ATA claim premised on § 2339A, a complaint must allege "a connection. . . between the defendant's mental state and the potential for harm to American nationals." *Gill*, 893 F. Supp. 2d at 506; *see also*, *Ahmad v. Christian Friends of Israeli Cmtys.*, No. 13 Civ. 3376 (JMF), 2014 WL 1796322, *3 (S.D.N.Y. May 5, 2014), *aff'd*, 600 F. App'x 800 (2d Cir. 2015). Under § 2339B, a complaint must allege that the defendants knew that they were providing material support to a terrorist organization. *Weiss*, 768 F.3d at 208. Under § 2339C, a complaint must allege that the defendants knew and intended that their funds would be used for a terrorist attack. *Ahmad*, 2014 WL 1796322 at *3 (citing *Gill*, 893 F. Supp. 2d at 504). Circumstantial affiliations with a terrorist organization are not enough to support a claim that material support was provided with knowledge, intent, or even willful blindness. *See Sokolow*, 60 F. Supp. 3d at 521.

Willful blindness is a standard that "surpasses recklessness and negligence," meaning that a "willfully blind defendant is one who . . . can almost be said to have actually known the critical facts." *Iowa Pub. Employee's Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321, 345

(S.D.N.Y. 2013); *see also Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428-29 (E.D.N.Y. 2013). To sufficiently plead a claim under the ATA that rises to the level of willful blindness, the amended complaint must allege facts that support that: (i) the U.S. defendants subjectively believed that there was a substantial probability that they were providing material support to a terrorist organization and that an American would be injured or that terrorist acts would be committed with such support, and (ii) the U.S. defendants took deliberate actions to avoid learning those facts. *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d at 517; *Strauss*, 925 F. Supp. at 429; *Gill*, 893 F. Supp. 2d at 555; *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 2070 (2011).

Nowhere does the amended complaint allege that the U.S. defendants believed there was a high probability that the four fund transfers they made were destined for al-Shabaab, that there was any probability that the transfers would lead to injury to an American citizen or a terrorist attack, or that the U.S. defendants took deliberate action to avoid confirming that belief. In fact, the amended complaint's primary allegation aimed at "willful blindness" (AC ¶ 59) falls far short of this. What the amended complaint actually says, and all it says, is that certain places to which the defendants remit funds are under the control of al-Shabaab leading to a "substantial probability" that funds could "fall[] into the hands of these terrorists." (AC ¶ 59.) And to confirm that this is exactly what the plaintiffs meant to say, the assertion is repeated later in the amended complaint when plaintiffs again allege that the defendants transferred funds *not* to al-Shabaab, but to recipients *in* "*al-Shabaab controlled territories*." (AC ¶ 63.) But, accepting the amended complaint's allegations as true, a terrorist group's control of a particular geographic area does not automatically mean that funds cannot be transferred to persons in that area. Indeed, as the previously referenced USAID report points out, "at least $1.2 billion per year, equal to almost half of Somalia's GDP" is sent by Somali expatriates to their families back home.[15] In all events, "[t]he prospect that monies paid to third parties for a legitimate purpose might *eventually* find their way to terrorists" does not give rise to liability under the ATA. *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 MDL 1570 GBD/FM, 2008 WL 7073447, at *4 (S.D.N.Y. Dec. 23, 2008).

Nor is there any allegation that the U.S. defendants deliberately avoided knowledge that funds were going to al-Shabaab. To the contrary, the amended complaint affirmatively alleges that the U.S. defendants' customers disguised the identity of the ultimate recipients of these transfers thereby *precluding* the U.S. defendants from acquiring such knowledge. Although the amended complaint does assert, again on a conclusory basis, that the U.S. defendants had poor compliance policies, a claim that the U.S. defendants expressly deny, that is insufficient to constitute willful blindness. First, plaintiffs allege no required compliance policies that would have caught the fact that the Minnesota criminal defendants disguised their recipients' true identities.[16] Second, "[n]oncompliance with banking laws and industry standards is insufficient, standing alone" to state a claim against a financial institution for liability for acts of terrorists based on transfers in which the financial institution was the conduit. *In re Terrorist Attacks*, 2008 WL 7073447, at *2.

### C. The Amended Complaint Fails to Plead Proximate Causation.

The amended complaint is also fundamentally flawed on the issue of proximate causation. Under *Twombly/Iqbal*, plaintiffs' conclusory allegations in certain counts of the amended complaint that defendants' "provision of material support" (AC ¶¶ 89, 98) (or in the case of Count III "provision of and/or collection of funds") (AC ¶ 101) to al-Shabaab proximately caused plaintiffs' injuries are legally insufficient to sustain a valid cause of action. And the amended complaint contains nothing further than these conclusory assertions.

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[15] *See* p.5 and n.2 *supra*.

[16] The only deficiency in the U.S. defendants' compliance programs that the amended complaint actually alleges is that they do not require senders who remit less than $2000 to provide identification. Not only is this entirely legal, it is also irrelevant to the claims asserted. There is no allegation that the identity of the *sender* of any remittance is relevant to these claims.

"Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his *acts were a substantial factor in the sequence of responsible causation* and whose injury was reasonably foreseeable or anticipated as a natural consequence." *Rothstein*, 708 F.3d at 91 (citation omitted). As the Second Circuit has made clear, the injury for which damages are sought – here, the deaths of plaintiffs' parents – must be "reasonably foreseeable or anticipated as a natural consequence" of conduct alleged – here, as to the U.S. defendants, the four transfers made in 2009. *Rothstein*, 708 F. 3d at 91; *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003), *as amended* (Apr. 16, 2003) (bank's violation of state reporting requirements too attenuated to link to investment losses).

In determining proximate cause pursuant to § 2333(a), "[t]emporal and factual issues will often be crucial." *Gill*, 893 F. Supp. 2d at 508. "The more attenuated the cause and effect, and the more inferential leaps the jury would have to make to find that Defendants' actions resulted in Plaintiffs' injuries, the less likely it is that Plaintiffs can meet their burden with respect to causation." *Sokolow*, 60 F. Supp. 3d at 515. For the purposes of pleading, "[w]here . . . there is a remoteness in time, there must be sufficient factual allegations of a connection between the material support provided and the acts of terrorism that caused plaintiffs' injuries, such that a reasonable trier of fact could conclude that it was more likely than not that the support provided by the defendant assisted the terrorists in the commission of the terrorist act." *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d at 517.

The timing of the U.S. defendants' alleged conduct, and its remoteness from the acts that allegedly harmed plaintiffs, doom plaintiffs' allegations of causation. At issue are small amounts of money transferred to disguised beneficiaries *five years* before Mrs. Warsame's and Mr. Anshoor's deaths. This is a quintessential example of the type of remoteness in time that precludes a finding of proximate causation under *Gill*. There, the court posited that proximate cause might be shown through evidence of a "major recent contribution with a malign state of mind," but "a small contribution made long before the event – even if recklessly made – would not be." 893 F. Supp. 2d at 507. At the time the alleged transfers took place, both Mrs. Warsame and Mr. Anshoor were still living in the United States. It would be *three years* before she returned to Somalia and *four years* before he did, *three years* before she began to run for political office in that country in opposition to al-Shabaab, and *two years* before she wrote the song that supposedly infuriated "Dahabshiil." These are plaintiffs' own allegations, and they destroy any conceivable set of undisclosed facts or permissible inferences that the U.S. defendants could have "reasonably anticipated" that the sequence of events leading to these deaths would take place years later, or that any of the transfers was a "substantial factor" in bringing them about. Just as alleging the provision of "routine banking services" fails to plead a defendant's criminal intent, the mere provision of these same services is not enough to show proximate causation for a terrorist attack. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 124-25.

It is thus not surprising that only in the most conclusory way – literally the bare statement that defendants' material support was the proximate cause of plaintiffs' injuries (AC ¶¶ 89, 95,

101) – do plaintiffs purport to link the funds transferred in 2009 to their parents' deaths five years later. Given the timing of the events the amended complaint does allege, this defect is not curable. For this reason alone, the amended complaint must be dismissed with prejudice.

## CONCLUSION

As set out above, plaintiffs have failed to plead the requirements for their claims. Their allegations of agency and civil conspiracy fail. Their group pleading fails to meet the requirements of Rule 8. Plaintiffs lack standing to assert claims of the decedents' estates. They have failed to allege that any conduct of the U.S. defendants proximately caused any injury to them. In addition,

- As to Count 1, the amended complaint fails to allege that the U.S. defendants intended to injure an American, intended to help a terrorist organization in injuring an American or were reckless with respect to the substantial probability of injury to an American.
- With respect to Count II, the amended complaint fails to allege that the U.S. defendants knew or intended to provide material support to a terrorist organization.
- And with respect to Count III, the amended complaint fails to allege that the U.S. defendants had any knowledge or intent that funds remitted by them would be used in a terrorist attack.

Accordingly, and for the foregoing reasons, and for the additional reasons set forth in the Motion to Dismiss Defendants Dahabshiil Transfer Services, Ltd. and Dahabshiil PVT, the U.S. defendants respectfully submit that the amended complaint against them should be dismissed.

Respectfully submitted,

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